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Supreme Court, U.S.
FILED
AUG 18 2000
CLERK

No. 00-104

In The

Supreme Court of the United States

CUSTOM FOOD MACHINERY, INC. and
RON McNIEL, Sr.,

Petitioners,

vs.

MARIA TERESA DE SARACHO,
EUREKA CANNERS GROUP, S.A., and
EUREKA MEXICANA, S.A.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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QUESTIONS RESTATED

1. Does Federal Rule of Evidence 703 require a trial court to make a determination that an expert's reliance on documents which have been stipulated into evidence was reasonable?

2. Is the trial court required to make an explicit finding as to the reasonableness of an expert's sources, and if so, is the trial court's determination that those sources have an adequate "index of reliability" sufficient?

3. Does a non-specific objection to the reliability of an expert's information sources trigger a duty in the trial court to review all the evidence and anticipate a specific reliability argument that was not made until after the trial?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondent Eureka Mexicana, S.A. states that it has no parent corporation and that no publicly held company owns 10% or more of its stock.

Pursuant to Supreme Court Rule 29.6, Respondent Eureka Canners Group, S.A. states that it has no parent corporation and that no publicly held company owns 10% or more of its stock.

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M.H. Graham, *Handbook of Federal Evidence* (4th ed. 1996) 8, 9

Imwinkelried, Developing a Coherent Theory of the Structure of Federal Rule of Evidence 703
47 Mercer L. Rev. 447 (1996) 8

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STATEMENT

At trial Petitioner Ron McNiel, President of Custom Food Machinery, admitted he knew he was participating in a fraud when he supplied blank pre-signed Custom Food Machinery invoices to his co-conspirators – invoices that were then filled in with a completely false description of a $2.15 million transaction.[1] Respondents (plaintiffs below) were misled into paying premium prices for antiquated, inoperable cannery equipment, rather than the high quality equipment petitioners fraudulently represented they were selling. As an additional consequence of the fraud, plaintiffs borrowed U.S. dollars from a Mexican bank under loan contracts that were pegged to the value of the Mexican peso. Thus, when the junk equipment incapacitated the cannery, and the peso-to-dollar exchange rate slid precipitously as a result of a government devaluation, the interest rates on plaintiffs' loans soared, and plaintiffs had no functioning cannery business with which to repay.

When this diversity fraud case went to trial, plaintiffs' claimed damages exceeding $27 million.[2]

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[1] Q. Forget Exhibit 14 for a second. You understood when you handed out the blank invoices that someone was going to use those to mislead someone else, right?

A. Yes.

P-ER 2204 (McNiel trial testimony). "P-ER" refers to the excerpts of record filed by plaintiffs/respondents in the court of appeals.

[2] In addition to the $11.3 million bank debt, plaintiffs presented uncontested evidence that as a result of the fraud: one of the corporations victimized by petitioners' fraud had lost more than $15 million in anticipated profits; another plaintiff

In a compromise general verdict, the jury awarded $12.5 million.

One component of the amount claimed by plaintiffs was $11.3 million – the balance due on the Mexican bank loans as of the time of the trial. This amount was calculated by plaintiffs' expert witness, a Certified Public Accountant. The CPA's testimony was simple and straightforward; and it was not based on any "assumptions"[3] at all. He multiplied the interest rates set forth in loan agreements and promissory notes, all of which had been properly authenticated and admitted into evidence (without objection) much earlier in the trial, by the loan principal in order to calculate the balance due. There has never been any contention that the CPA's reading of the interest provisions in the loan documents was incorrect, or that the simple arithmetic he performed was flawed in any way.

In fact, the defendants introduced no evidence and made no argument at trial contradicting the CPA's computations. They offered no alternative interest rate calculation. Their only contention at trial was that the loan agreements and promissory notes were, for some unstated reason, an unreliable basis for the expert's opinion about the interest rate called for by the loan.

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corporation was put out of business entirely; numerous non-bank debts and expenses also resulted from the deception; and the individual plaintiff who had guaranteed all of the bank loans was suffering from severe emotional distress.

[3] Pet., at 3.

In overruling defendants' objection, the trial court found that even if the loan documents had not been admitted into evidence (as defendants mistakenly contended for a while), they were sufficiently reliable to be the basis of an expert's testimony about the applicable interest rate:

> And in this instance, I have no difficulty in feeling that these loan documents have some index of reliability for what they purport to be.[4]

Eight months after the trial was over, the defendants filed an unsuccessful motion for relief from judgment under Federal Rule of Civil Procedure 60(b)(3). At that time the defendants revealed that they had some hearsay evidence (not introduced at trial) indicating that the Mexican bank might be willing to apply a lower interest rate than the one reflected in all the loan documents and that the bank might settle its claims with plaintiffs for less than the full amount due on the loans. Although they had an opportunity to do so, the defendants declined to take any post-trial depositions to authenticate the evidence they had regarding the Mexican bank's position.

In the Ninth Circuit, defendants claimed that there was a "wild inconsistency" between the rate the bank applied in its April 1995 notices and the rate the CPA used for subsequent periods.[5] The defendants never complained on their appeal, however, that the trial court had

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[4] P-ER 2238, reprinted in Petitioners' App., at 19a.

[5] It is not surprising that this "inconsistency" was not noticed or mentioned until long after the trial. The supposed "inconsistency" is simply a frivolous post-trial argument that the interest rate the bank utilized in the period immediately *before* the peso's slide accelerated in early 1995, differs from the

failed to make an independent finding about the reliability of the loan documents the CPA used to calculate interest payable. Instead, they argued that the CPA's testimony should have been excluded based on: (a) the post-trial argument that the interest rates called for in the loan documents were inconsistent with the rates of interest applied in the Mexican bank's April 1995 notices; and (b) the post-trial discovery of evidence that the bank might be willing to negotiate the balance due and use a different interest rate.

In a ruling petitioners do not challenge, the Ninth Circuit upheld the denial of Rule 60(b) relief. Petitioners' App., at 12a. Thus, the court found no reason to take into consideration any of the evidence adduced after judgment. Based on the trial record, the Ninth Circuit upheld the admission of the CPA's testimony as a permissible exercise of discretion, citing this Court's decision in *General Electric Co. v. Joiner*, 522 U.S. 137 (1997). Petitioners' App., at 7a to 7b.

The dissenting judge in the court of appeals, however, based his decision to remit $2.5 million of the judgment (authorizing a total award to plaintiffs of $10

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rate the accountant used for the time periods *after* the peso plummeted. At trial, the CPA did compare those rates and testified that the early bank statements *confirmed* his reliance on the interest provisions stated in the loan documents: "I also checked them by looking at the statements that I did have from the bank. In other words, the bank had provided some early statements, just hadn't provided current statements. I checked to make sure that the methodology that was explained to me was accurate by recalculating it in the early years, 1995." P-ER 2227.

million) on a willingness to take into consideration hearsay evidence first offered *after* judgment as part of the Rule 60(b) motion. Moreover, the dissenting judge would have imposed a specific requirement on the manner in which a plaintiff could prove the amount due on a loan. Petitioners' App., at 13a. More significantly for purposes of this petition, the dissenting judge did not identify any error on the part of the district court in failing to carry out any *Daubert* gatekeeping function.

In this Court, petitioners read the Ninth Circuit decision as illustrative of a split between the circuits on Federal Rule of Evidence 703: with a "liberal" faction holding that a district court must yield to the actual practices of experts in relying on otherwise inadmissible evidence; while a "restrictive" camp requires the trial court to make its own determination on whether that reliance is reasonable.

There does not appear to be any post-*Daubert*[6] controversy on this issue, however. Two of the three circuits that were formerly in the "liberal" faction have now recognized that *Daubert* precludes their earlier interpretation. The third, the Sixth Circuit, has not yet had an opportunity to revisit the subject. There is no reason to think the Sixth Circuit remains in the "liberal" faction. No opinion published in any circuit after *Daubert*, least of all the opinion in *this* case, can be read as endorsing the "liberal" interpretation.

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[6] *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

Even if the pre-*Daubert* split were to be resuscitated by some circuit's adoption of the "liberal" interpretation tomorrow, that controversy would have no application to this case anyway. First, petitioners have not preserved the issue they tender for this Court's review. Second, the split of yesteryear involved different views of a trial court's duties where the expert relies on *in*admissible evidence; here the basis of the CPA's testimony had been stipulated to be admissible evidence months before the CPA ever took the witness stand. And third, the trial judge in this case independently evaluated the reliability of the data relied on by the expert and then made an explicit finding that it was reliable; even the most "restrictive" views of Rule 703 do not require anything more than that.

REASONS TO DENY THE WRIT

I. PETITIONERS HAVE NOT PRESERVED FOR THIS COURT'S REVIEW THE ISSUE THEY RAISE.

The Ninth Circuit did not consider and decide the legal issue presented by the petition. That is because petitioners did not brief either Rule 703 or *Daubert* in the court of appeals. There was no mention made about a "liberal" or a "restrictive" approach to Rule 703. Nor was there any contention raised that the district court had yielded to the expert's own practices, thereby failing to carry out its duty to independently consider the trustworthiness of the information relied upon. This Court, as a matter of policy, does not decide questions that were not presented to the court of appeals for consideration.

Additionally, it was not until long after the trial was over that petitioners first suggested that there was any "inconsistency" between the interest rates described in the loan documents and the rates used by the bank in the early years of the loan. A trial judge is not obligated to anticipate post-trial factual arguments in ruling on the admissibility of evidence. As the Ninth Circuit observed, by failing to specifically object in the district court (as required by Federal Rule of Evidence 103) petitioners waived all such evidentiary arguments. Petitioners' App., at 8a. This lack of proper, specific objection makes the case fact-bound and would require affirmance without regard to the existence of any circuit court conflict.

Additionally, in arguing that the result below was flawed, the petition relies heavily on hearsay that was not proffered until *after judgment*, during Rule 60(b) proceedings. *See Pet.* at 4. But the denial of Rule 60(b) relief is not challenged in the petition. Questionable evidence, which was not before the district court during trial, is not available after the fact to attack the admission of the CPA's testimony.

II. THERE IS NO POST-*DAUBERT* SPLIT CONCERNING THE TRIAL COURT'S ROLE WHERE AN EXPERT RELIES ON OTHERWISE INADMISSIBLE EVIDENCE.

Petitioners report a "pervasive conflict" regarding an expert's use of otherwise inadmissible evidence under Federal Rule of Evidence 703.[7] They cite four secondary

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[7] Pet., at 4.

authorities as having recognized this split.[8] However, none of the "liberal" cases cited, either in the petition or in any of those secondary authorities, was decided *after Daubert* clarified the field in 1993.

Early cases from the Third Circuit were the ones most frequently cited in the past as illustrative of a "liberal" interpretation allowing the practices of experts in the field to dictate admissibility.[9] But in 1994 the Third Circuit recognized that "our former view is no longer tenable in light of *Daubert*," and it agreed that Rule 703 requires that "the judge must conduct an independent evaluation into reasonableness."[10]

One 1989 Fifth Circuit decision is also cited in petitioners' secondary authorities as illustrating the "liberal"

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[8] Pet., at 5-6, and 12-13, citing Epps, *Clarifying the Meaning of Federal Rule of Evidence 703*, 36 B.C. L. Rev. 53, 75-76 (1994) ("Epps"); Imwinkelried, *Developing a Coherent Theory of the Structure of Federal Rule of Evidence 703*, 47 Mercer L. Rev. 447, 464 (1996) ("Imwinkelried"); 2 M.H. Graham, *Handbook of Federal Evidence*, § 703.1, p. 105, n.14 (4th ed. 1996) ("Graham"); and 3 Mueller & Kirkpatrick, *Federal Evidence* § 357 (2d ed. 1994) ("Mueller & Kirkpatrick").

[9] *See, e.g.*, Epps, at 76, n.99, citing: *In re Japanese Elec. Prods.*, 723 F.2d 238, 276-277 (3rd Cir. 1983), *rev'd in part sub nom. Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), *on remand*, 807 F.2d 44 (3rd Cir. 1986), *cert. denied*, 481 U.S. 1029 (1987); *DeLuca v. Merrell Dow Pharmaceuticals*, 911 F.2d 941, 952 (3rd Cir. 1990); and *Indian Coffee Corp. v. Proctor & Gamble Co.*, 752 F.2d 891, 897 (3rd Cir. 1985). *See also* Graham, at 105-106, n.14 (citing the same cases); and Mueller & Kirkpatrick, § 357, p. 679-680, n.12 (citing two of the same cases).

[10] *In re Paoli Railroad Yard PCB Litigation*, 35 F.3d 717 (3rd Cir. 1994), *cert. denied*, 513 U.S. 1190 (1995).

approach.[11] But *Daubert* has apparently caused the Fifth Circuit to also abandon the "liberal" camp:

> Accordingly, the trial judge as gatekeeper has a duty under Rule 703 to determine whether such facts and data not admitted in evidence are of the type customarily relied upon by experts in the field and whether such reliance is reasonable.[12]

The Ninth Circuit opinion in *this* case is certainly no authority for a "liberal" approach to Rule 703. Petitioners never even mentioned *Daubert* in the trial court or in their appellate court briefing; nor did they allude to any split of authorities under Rule 703; nor did they suggest that the trial court had failed to follow a "restrictive" interpretation. Because the issue was never raised, the Ninth Circuit never saw any reason to take either side of the now-rapidly-healing split. However, in answer to the contention that was advanced below, that the trial court had abused its discretion by admitting the expert testimony, the Ninth Circuit backed up the trial court's express reliability finding with its own observation on the reasonableness of the expert's reliance:

> It is common sense that certified public accountants reasonably rely on loan agreements to calculate the interest due on loans.[13]

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[11] *See, e.g.*, Epps, at 76, n.99, citing: *Peteet v. Dow Chem.* Co., 868 F.2d 1428, 1432 (5th Cir. 1989), *cert. denied*, 493 U.S. 935 (1989). *See also* Graham, at 105-106, n.14 (citing the same case).

[12] *Moore v. Ashland Chemical, Inc.*, 126 F.3d 679, 691 (5th Cir. 1997), *rev'd en banc on other grounds*, 151 F.3d 269 (5th Cir. 1998).

[13] Petitioners' App., at 8a.

Petitioners also misdescribe the Ninth Circuit's other jurisprudence. According to petitioners, the "restrictive" approach has "only" gained acceptance in the Ninth Circuit in a dissenting opinion. This is petitioners' parenthetical description of what they say is that dissenter's lonesome recognition that a "restrictive" approach is required:

> (noting that the Supreme Court holding in *Daubert* stressed that 'in ruling on admissibility, trial judges are gatekeepers and should pay particular attention to the reliability of the expert and his or her testimony' (citations omitted)).[14]

But the language petitioners quote does not "only" appear in a dissenting opinion. In actuality, the dissenter in that case was quoting from a *unanimous* Ninth Circuit opinion, something which would have been obvious if petitioners had not omitted the full citation from their petition in this Court.[15] So the language petitioners quoted actually indicates that the "restrictive" approach has gained acceptance, not "only" in a dissenting opinion, but by a unanimous Ninth Circuit panel as well.

That leaves only one nineteen year old Sixth Circuit case as the single still-standing example of the "liberal" fork of the Rule 703 split.[16] Judging from what has happened in every other circuit since 1993, the pre-*Daubert*

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[14] Pet., at 10-11, citing *Sementilli v. Trinidad Corp.*, 155 F.3d 1130 (9th Cir. 1998) (B. Fletcher, J., dissenting).

[15] *Sementilli v. Trinidad Corp.*, 155 F.3d 1130, 1141 (9th Cir. 1998) (B. Fletcher, J., dissenting), attributing the quoted language to *McKendall v. Crown Control Corp.*, 122 F.3d 803, 806-07 & n.1 (9th Cir. 1997).

[16] *Mannino v. Int'l Mfg.*, 650 F.2d 846, 853 (6th Cir. 1981).

split will be completely healed once the Sixth Circuit has an opportunity to address the question with *Daubert* as guidance.

In short, no active conflict requires this Court's attention.

III. THE PRE-*DAUBERT* SPLIT IDENTIFIED BY PETITIONERS HAS NO APPLICATION WHERE THE BASIS OF THE EXPERT'S OPINION HAS BEEN STIPULATED INTO EVIDENCE.

The pre-*Daubert* split which is the subject of this petition concerned the courts' interpretation of the second sentence of Rule 703, which departed from the practice at common law by permitting an expert to rely on hearsay or otherwise inadmissible sources:

> If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.[17]

That sentence, the now-dated controversy about whether the court or the expert has the final word on what has been "reasonably relied upon," and the authorities cited in the petition, are only concerned with an expert who bases her opinion on otherwise *inadmissible* information.[18]

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[17] Federal Rule of Evidence 703.

[18] *See, e.g.*, Epps, *supra*, 36 B.C. L. Rev., at 76 ("This Article argues that Rule 703 imposes an active obligation on courts to determine the reasonableness of an expert's reliance on otherwise *inadmissible* facts or data.") (emphasis added).

The split identified by petitioners has nothing to do with the common law practice of allowing expert testimony based on documents that have been previously admitted into evidence.[19] Here the loan documents that provided the basis of the expert's testimony were all stipulated into evidence two months before the trial began.[20] By stipulating to their admission, the defendants were agreeing that the loan documents were sufficiently reliable for the jury to consider and utilize in reaching a verdict. Consequently, it was unnecessary for anyone to act as "gatekeeper" and preclude that information from getting to the jury through the medium of expert testimony. The defendants had already agreed that the evidence could pass through the "gate;" and the jury already had it. The jury could have performed an interest calculation based on the terms of the promissory notes all by itself; or plaintiffs' counsel could have illustrated the necessary arithmetic in his closing argument. In such circumstances, it was certainly proper for an expert witness to take such evidence into account.

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[19] Epps, *supra*, 36 B.C. L. Rev., at 56-57 ("The common law admitted opinions based on facts or data personally observed as well as opinions based on facts or data presented at trial.").

[20] In a pre-trial order, the district court required the parties to provide written objections to any documentary evidence offered by a date certain. *See* U.S.D.C. Dkt. No. 49. All of the loan documents were properly designated by plaintiffs (Dkt. No. 48); and defendants never registered any objection to any of them. When the loan documents were later offered at trial, petitioners confirmed that they had "no objection" to their admission. *See, e.g.*, Respondents' Appendix attached hereto, at 1a to 4a.

Nothing required the trial judge to anticipate a post-trial argument and then usurp the jury's function of placing whatever reliance it deemed appropriate on documents the defendants conceded were admissible into evidence. Nothing in Rule 703, *Daubert*, or any circuit court decision draws into doubt the evidentiary rulings of the district judge in this case.

IV. THE TRIAL COURT'S EXPRESS FINDING OF RELIABILITY IS SUFFICIENT UNDER ANY STANDARD.

It is not clear whether the now practically-unchallenged "restrictive" interpretation of Rule 703 would require the district court to make an *explicit* finding on the reasonableness of an expert's reliance on inadmissible sources. The Second Circuit did not think so:

> We decline, however, to shackle the district court with a mandatory and explicit trustworthiness analysis . . . In fact, we assume that the district court consistently and continually performed a trustworthiness analysis sub silento of all evidence introduced at trial. We will not, however, circumscribe this discretion by burdening the court with the necessity of making an explicit determination for all expert testimony.[21]

In this case, the district court made an explicit finding that the loan documents had a sufficient "index of reliability" to provide the basis of the CPA's opinion,

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[21] *United States v. Locascio*, 6 F.3d 924, 938-939 (2d Cir. 1993), *cert. denied*, 511 U.S. 1070 (1994).

irrespective of whether they had been admitted or not.[22] So whether there is a split in the circuits or not is completely irrelevant here, where the district court complied with *any* standard that could arguably apply.

CONCLUSION

There was no "undeniable windfall" in this case. The jury's $12.5 million compromise verdict was fully justified, either by reference to the CPA's calculation of the $11.3 million bank debt, or by considering the $16 million in other damages incurred by plaintiffs as a result of petitioners' admitted fraud. Nor is there any continuing split in the interpretation of Rule 703. And even if there were, such an issue is immaterial to the outcome of this case.

[22] P-ER 2238, reprinted at Petitioners' App., at 19a.

The petition for writ of certiorari should be denied.

DATED: August 18, 2000

Respectfully submitted,

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RESPONDENTS' APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

MARIA TERESA DE SARACHO; EUREKA CANNERS GROUP, S.A., a corporation formed under the laws of Mexico; and EUREKA MEXICANA, S.A., a corporation formed under the laws of Mexico, Plaintiffs,

v.

CUSTOM FOOD MACHINERY, INC., a California corporation; RON McNIEL, SR., FRED AVALLI, and DOE 1 through DOE 25, inclusive, Defendants

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No. C-95 20854 WAI

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[The following is an excerpt from pages 373-374, 541 and 543 of the transcript of the trial proceedings occurring on June 26, 1997. The entire trial transcript is contained in the record on appeal in the Ninth Circuit Court of Appeals.]

[373] Q. What is 388, and what's 388-e?

Mr. Keegan: Your Honor, I move in 129 and 129-e.

The Court: All right. You already did.

Mr. Keegan: I'm sorry.

(Exhibit 129, 129-e received in evidence.)

The Witness: This is another – another loan for Eureka Canners Group where I – I guarantee – I guarantee the loan. And the amount is nine thousand thirty-five – thirty-five hundred – I'm sorry, nine hundred thirty-five thousand dollars.

Mr. Keegan: Q. Okay.

A. Excuse me. My English is very bad.

Q. And I would like to hand you a third and final loan, which has Exhibits 386 and 386-e. Tell me what that is.

A. This is another loan that was given to Eureka Canners Group in which I signed – I co-signed. I responsible for these. And the amount is five thousand – five hundred thousand dollars.

Mr. Keegan: Your Honor, I would like to move in 386 and 386-e.

[394] The Court: Any objection?

Mr. Needham: I have no objection to the English translations going in of those documents. And was 129-e already admitted? I have no objection to that.

The Court: Yeah, yeah.

Mr. Needham: Just the English documents with respect to that.

(Exhibit 386, 386-e received in evidence.)

* * *

[541] Mr. Needham: So 126, 381, and 389?

Mr. Keegan: That's exactly right.

Mr. Needham: All right.

Mr. Keegan: Q. What are these documents?

A. That's are – these are – you call payable notes.

Q. Promissory notes?

A. Promissory notes.

* * *

[543] Mr. Keegan: And, Your Honor, in the meantime, Your Honor, I would like to move in 389, 381 and 126.

The Court: Any objection to those three?

Mr. Needham: No.

The Court: They will be admitted.

Mr. Keegan: Thank you, Your Honor.

(Exhibits 126, 126-e, 381, 381-e, 389, and 389-e received in evidence.)